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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

MAY 28 1998

In the Matter of	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	
	)	CS Docket No. 97-151
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

REPLY TO OPPOSITIONS TO BELL ATLANTIC'S PETITION FOR CLARIFICATION OR RECONSIDERATION

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Table of Contents

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REPLY TO OPPOSITIONS TO BELL ATLANTIC'S[1]
PETITION FOR CLARIFICATION OR RECONSIDERATION

I. Introduction and Summary

Despite the feigned outrage of the cable companies at the suggestion that cable companies who provide access to the Internet should pay the same pole attachment rates as other carriers who provide similar services, the fact remains that their demands for a special advantage are foreclosed by the 1996 Act. Section 224(d) states, in unequivocal terms, that the more favorable pole attachment rate formula in that subsection is to be applied only to an attachment that is used by a cable television system solely to provide cable service. To the extent that a cable company uses a pole attachment to provide something other than cable service, including access to the Internet, it is subject to the

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

Section 224(e) rate formula. The Commission should modify its rules to follow the clear terms of the Act.

The responses to the petitions for reconsideration contained other efforts to obtain artificial advantages. For instance, Winstar urges the Commission to adopt a presumption that the rate utilities may charge for access to rights of way is close to zero. And NCTA argues that the conduit owner alone should be forced to bear the costs of "other than usable" conduit space, rather than follow the allocation formula prescribed in the Act. In each instance, these proposals clearly contradict the terms of the statute, and should be rejected.

II. The Act Is Clear That Cable Companies Are Not Entitled To The More Favorable Section 224(d) Rate When They Use Pole Attachments To Provide Access To The Internet.

The cable companies go to great lengths to try to preserve the preferential "cable only" pole attachment rate specified in Section 224(d) for services that clearly go beyond cable service. NCTA at 3-9; Time Warner at 4-12; Adelphia at 2-11; Texas Cable at 15-19. None of their arguments can be squared with the clear provisions of the Act. Accordingly, the Commission should reconsider, and revise, its rules to apply the standard Section 224(e) pole attachment rate to cable companies that provide access to the Internet.

NCTA argues (at 3-5) that the Commission's decision to apply the "cable service only" rate provided in Section 224(d) to "commingled" cable and Internet access service is supported by the Commission's Heritage decision. To the contrary, in the Heritage case, the Commission established a single, regulated pole attachment rate for a cable

company that provided "commingled" cable service and non-video telecommunications services under the Act as it existed prior to the 1996 amendments. Because the Act was ambiguous at that time about whether Congress intended to exclude non-video services from the pole attachment rate formula for cable companies, the Court upheld that decision. [2]

In the 1996 Act, Congress cleared up this ambiguity. It did so in the first instance by amending Section 224(d) to clearly state that the preferential pole attachment rate provided in that subsection applies to any pole attachment by a cable television system that is used "solely to provide cable service." (Emphasis added). In addition, Congress added a new rate formula in Section 224(e) for pole attachments by a cable television system that are used to provide any other services. This was done specifically to "remedy the inequity of charges for pole attachments among providers of telecommunications services." H. Rep. No. 104-458 ("Joint Explanatory Statement").[3] Applying the Section 224(d) rate to pole attachments that cable companies use to provide access to the Internet

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[2] Heritage Cablevision Associates of Dallas v. Texas Utilities Electric Co., 6 FCC Rcd 7099 (1991), aff'd Texas Utilities Electric Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993) ("Heritage").

[3] Indeed, the Commission did not cite Heritage to justify applying the cable-only pole attachment rate to cable companies that provide non-cable services. ***See*** Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, FCC 98-20 (rel. Feb. 6, 1998) at ¶30 ("Pole Attachment Order"). The Commission only held that Heritage supported the Commission's authority to regulate the rates for non-video pole attachments, and that the 1996 Act affirmed the Commission's authority to regulate such attachments.

would preserve the inequity between cable companies and other telecommunications carriers that Congress expressly amended the Act to eliminate.

The cable companies also argue that Internet access by a cable system comes within the statutory definition of "cable service" as a result of the amendments to that definition in the 1996 Act. NCTA at 6-7; Time Warner at 8; Texas Cable at 16. Neither the language of the 1996 Act nor the legislative history supports this expansive reading, however. The 1996 Act merely added the words "or use" to the definition of "cable service." *See* Section 602(6)(b). As a result, the definition states that cable services include "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." (emphasis added). "Video programming," in turn, is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station. Section 602(20). "Other programming service" is defined as "information that a cable operator makes available to all subscribers generally." Section 602(14). These definitions clearly exclude two-way communications services, such as Internet access, which give an end user the ability to both send and receive data, e-mail, facsimiles, and even voice communications with other end users.

According to the legislative history, the additional term "or use" in the definition of "cable service" reflects the evolution of cable to include interactive cable services and information services, but Congress made it clear that "[t]his amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities," nor was it intended to capture such services as "dial-up access to

information services." Joint Explanatory Statement at 169. But when cable companies provide the transmission service to obtain access to the Internet, they are providing a telecommunications service through their cable system facilities, and are providing the equivalent of dial-up access to information services. And the Commission correctly has concluded that, when a cable company begins providing a telecommunications service, it is subject to the Section 224(e) pole attachment rate. Pole Attachments Order at ¶ 35. As a result, the cable companies cannot shield their telecommunications services from the Section 224(e) rate by claiming that Internet access is nothing more than glorified interactive cable programming.

Nor can cable companies escape the fact that, when a cable company provides the underlying telecommunications service to connect its subscribers to an Internet access provider, it is providing a telecommunications service to the same extent as a local exchange carrier that connects its subscribers to the Internet. In fact, in its Report to Congress on universal service, the Commission itself found that "entities providing pure transmission capacity to Internet access or backbone providers provide interstate 'telecommunications.'" Federal-State Joint Board on Universal Service, CC Docket 96-45, Report to Congress at ¶ 55 (rel. Apr. 10, 1998). This conclusion applies equally regardless of whether the entity providing the underlying transmission service began life as a local exchange carrier, an interexchange carrier, a competing access provider, or a cable company. On reconsideration, therefore, the Commission should find that cable companies who provide transmission services to obtain access to the Internet, either to

their own Internet access services or to non-affiliated Internet access providers, are providers of telecommunications services for purposes of applying pole attachment rates.[4]

Applying the Section 224(e) rate to Internet access services by cable companies is not only required by the statute, but is good public policy. The cable companies claim that giving them a preferential rate compared to other providers of access to the Internet will promote competition. NCTA at 7-8; Time Warner at 9; Adelphia at 8-11. The opposite is true. Giving an artificial advantage to one set of competitors may make it easier for them to enter the market, but it does not promote competition. To the contrary, it hurts competition by encouraging inefficient entry and by displacing more efficient rivals. And while some cable interests claim that giving a preferential rate to cable Internet services is necessary to prevent "anti-competitive conduct" by pole owners, the simple fact is that it is not anti-competitive to charge similar pole attachment rates to companies that are providing similar services. Time Warner at 9. Competitive neutrality requires the Commission to apply the same Section 224(e) pole attachment rates to all providers of access to the Internet, and it is the result urged by the cable companies that would be "anti-competitive."

The cable companies also oppose a rule requiring the cable companies to certify whether they are providing services, such as Internet access, that would subject them to

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[4] Even if the Commission were to continue to classify Internet service on a cable system as neither "cable" nor "telecommunications" services, it nonetheless should reverse its decision to exempt such services from the Section 224(e) pole attachment rates. The Act is clear that the Section 224(d) rate applies "solely" to the extent cable companies use attachments for traditional cable services; Section 224(e) contains no such limitation. ***See*** SBC at 21; EEI at 3-4; TUEC at 2-4; MCI at 2.

the Section 224(e) pole attachment rates. Adelphia at 11-12; Texas Cable at 19. They claim that a certification requirement would be burdensome and would inhibit competition, and that it would be duplicative of the Commission's requirement that a cable company give prior notice before using pole attachments to provide telecommunications services. However, certification should impose no burden on the cable companies, who are well aware of the range of services they offer to their customers. Also, it would have no effect on competition, since the Commission's rules already require a cable company to notify the pole owner when it begins providing telecommunications services through pole attachments. Moreover, the certification process would ensure that the pole owners would have sufficient information to develop accurate pole attachment rates for all of their attachers.[5]

III. The Commission Should Not Prescribe A Rate Formula For Rights Of Way.

Winstar argues that the Commission should prescribe "guiding principles" for the rates that a utility may charge for access to rights-of-way. Winstar at 13-16. Specifically, Winstar wants the Commission to find that a "just and reasonable" rate for such access must be based on incremental cost, and to adopt a presumption that this rate is close to zero (no more than clerical, record-keeping costs).

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[5] To ensure accurate rates, such certification should include whether telecommunications services are offered by parties overlashing a cable company's pole attachments, which would trigger the Section 224(e) rate. EEI at 5.

The Commission should reject this proposal. Winstar makes no attempt to square its arguments with the terms of Section 224(e), which states that the costs of pole attachments (including rights-of-way) shall be "apportioned" among attaching entities according to the number of entities (for the costs of unusable space) or the amount of space used by each entity (for the costs of usable space).[6] Winstar's proposal to have the utility bear all of the "first costs" of the rights-of-way is directly contrary to the statutory scheme, which is designed to apportion costs of pole attachments among all users based on a "fully allocated cost formula." Joint Explanatory Statement at 206.

In the Pole Attachments Order, the Commission correctly decided that there were too many different types of rights-of-way, and too little data in the record, to prescribe a rate formula for rights-of-way. Pole Attachments Order at ¶¶ 120-21. For this reason, the Commission decided to address complaints about just, reasonable, and nondiscriminatory pole attachments to a utility's rights-of-way on a case-by-case basis. Winstar adds nothing to the record that would give the Commission a basis for departing from these findings.

IV. The Commission Should Not Revisit Its Decision To Exclude Rooftop Attachments From The Definition Of "Rights Of Way."

The Commission did not include access to rooftops, either owned by utilities or by third parties, in the scope of pole attachments that utilities must provide to cable companies and telecommunications carriers. Pole Attachments Order at ¶ 120. Winstar

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[6] Section 224(e) would apply to carriers, such as Winstar, that use rights-of-way to provide wireless telecommunications services. Rights-of-way used by cable companies to provide solely cable services would be subject to the Section 224(d) rate formula.

supports Teligent's efforts to reverse this decision, and to allow wireless carriers to install antennas on rooftops owned by utility companies or on rooftops owned by third parties to which utilities have access under "rights-of-way." Winstar at 5-9. The Commission should reject these efforts.

The Commission was correct in deciding that Section 224 does not encompass access to a utility's buildings. In the Local Competition Order, the Commission found that Section 224(f) does not require a utility to make space available on the rooftops of its buildings for the installation of a telecommunications carrier's transmission towers. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) at ¶ 1185. The Commission also found that Congress amended Section 224 to allow cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, but not to grant broad-ranging access to any property owned or controlled by the utility. Id. There is nothing unique or scarce about the rooftops on utility buildings, such that they should be brought into the ambit of Section 224.

Moreover, it is clear that Winstar and Teligent primarily seek intervention in their dealings with private building owners, not utilities. They argue that wireless carriers have found negotiations with some building owners to be "costly and inefficient." Winstar at 9. This is no justification for attempting to extend the reach of Section 224 to private property owners through the "hook" of a utility's rights-of-way. The fact that a utility may have access to the roof on a third party's building does not give it "control" over that rooftop, such that it can compel the property owner to allow a wireless carrier to

attach an antenna on the roof. The Commission should not interpose utility companies in clearly private negotiations between the wireless carriers and building owners over rooftop attachments.

V. The Commission Should Adopt A Reasonable Formula For Unusable Conduit Space.

The Commission's current formula classifies almost all of the costs of conduit, except for the duct itself, as "other than usable." USTA proposed a more reasonable definition of "unusable" conduit space based on the percentage of space in conduit that cannot be used for telecommunications purposes because it is reserved for spare, maintenance, municipal ducts, and other purposes. USTA Petition at 8-9.

Not satisfied with USTA's proposal, which would significantly reduce the amount of conduit costs that are "unusable," NCTA argues that conduit users should not be required to pay any of the costs of "unusable" conduit space. NCTA at 9-10. This is both unreasonable and flatly contrary to the statute. Since the amount of conduit space that is not "usable" benefits all users of conduit, the costs of this space must be apportioned equally among all users, as expressly provided in Section 224(e)(2). Joint Explanatory Statement at 206. In contrast, NCTA's proposal to require conduit owner to bear 100 percent of the costs of unusable space is foreclosed by the Act.

VI. The Commission Should Make It Clear That Overlashers Should Be Counted As Attaching Entities For Allocation Of Unusable Space Costs.

AT&T argues that an overlasher should not pay any compensation to the pole owner, since it does not occupy any additional pole space. AT&T at 5. This is directly

contrary to the scheme in Section 224(e), which allocates the costs of unusable space based on the number of attaching entities, and not on the amount of space occupied by each entity, on the theory that all attachers benefit equally from the portion of a pole or conduit that is "unusable." Pole Attachments Order at ¶¶ 46, 69; Joint Explanatory Statement at 206. Accordingly, the Commission should adhere to its finding that third party overlashers owe compensation to the pole owner for their share of "unusable" space costs.

Since an overlasher will have a financial responsibility to the pole owner, and since overlashing affects the operation and safety of the pole, the Commission should require the overlasher to give prior notice to the pole owner. As EEI points out, "overlashing has serious physical impacts, constitutes a separate attachment, and must necessarily be coordinated with the pole owner." EEI at 6.

VII. The Commission Should Give Pole Owners Flexibility In Determining The Areas Within Which There Would Be A Presumptive Number Of Attaching Entities.

Several petitioners asked the Commission to reconsider its decision to require pole owners to develop a presumptive number of attaching entities by urban, urbanized, and rural areas. ***See, e.g.,*** USTA Petition at 10-11; SBC Petition at 10-16. The petitioners demonstrated that this requirement would be burdensome, because there is no clear delineation between these areas, and because pole owners do not have the data to segregate pole attachments among these areas.

MCI would make the situation worse. It urges the Commission to require the pole owners to disaggregate pole costs among these areas as well. MCI at 6. However, even

MCI recognizes that this would be burdensome. Id. at 7. For the same reasons that it would be difficult to determine a presumptive number of attaching entities by urban, urbanized, and rural areas, geographic deaveraging of pole costs among these areas would be extremely burdensome, and should not be required.[7]

Conclusion

The Commission should reject the efforts of cable companies and others to obtain preferential rates for pole attachments.

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[7] Whether deaveraged rates are mandatory or optional, the Commission should allow pole owners to recover the costs of developing and maintaining deaveraged rates in their charges for pole attachments.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 1998 a copy of the foregoing "Reply to Oppositions to Bell Atlantic Petition" was sent by first class mail, postage prepaid, to the parties on the attached list.

Jennifer L. Hoh

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